IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5221 OF 2004

Shri Sanjaykumar Damodar Surve ..Petitioner.

Versus

Shri Ganesh Ramchandra Naik & Ors. ..Respondents.

Mr.Balkrishna Joshi with Ms.P.N.Diwan for the Petitioner.
Mr. V.K.Choudhari with Dr. M.Shah Alam Khan for the Respondent No.1.
Mr. S.K.Chinchalikar, AGP for Respondents 3 and 5.

CORAM : S. A. BOBDE, J.
DATED : 20TH SEPTEMBER, 2005.

P.C.:

1. Rule returnable forthwith.

2. Mr. Chowdhari, the learned counsel waives service of Rule for the respondent No.1 and the learned AGP for respondents 3 and 5. The respondent No.4 though served is absent. Notice was issued by this court on 29th June, 2004 for final disposal.

3. This petition is filed under Article 226 and 227 of the Constitution of India. In this petition,

the petitioner has challenged the order of the respondent No.4 dated 5.11.2003 by which the said respondent has reversed the order passed by the Divisional Joint Registrar, sanctioning prosecution against the respondent No.1 under section 148 of the Maharashtra Co-operative Societies Act, 1960; hereinafter referred to as 'the Act'. Section 148 reads as follows :-

> Cognizance of Offences.- (1) No Court inferior to that of [Metropolitan Magistrate or a Judicial Magistrate of the First Class] shall try any offence under this Act.
>
> 2[* * * * *]
>
> [(3) No prosecution under this Act shall be lodged, except with the previous sanction of the Registrar]

4. The petitioner had applied to the Divisional Joint Registrar for permission to sue and prosecute the respondent No.1, in his capacity as a former Chairman and others, namely, Tukaram Ramchandra Naik, a former Dy. Chairman and Vinayak Waman Mhatre, a former Dy. Director, so also twenty others, who are former Directors of the Kalwa Belapur Sahakari Bank

Ltd., for large scale financial illegalities and irregularities. According to the petitioner the respondent No. 1 has worked as a Chairman from the inception of the respondent No.2 Bank till the year 1995. The statutory auditor's report of the Bank for the year 1998-1999 on page 53 mentions that loans were sanctioned by the respondent No.1 to industries and firms which were under his control. The loans to the extent of Rs.238/- crores are said to be outstanding. The names of the firms are given in the said application. There is some dispute about the aforesaid amount. However, that is not relevant for decision of the present petition. The petitioner also alleged that without obtaining securities for sanction of the Board of Directors, the loans were granted and disbursed as per their desire to the firms mentioned in the application. Against the said Tukaram Ramchandra Naik, it was alleged that he has disbursed the loan to the persons who are his relatives and servants by keeping the Board of Directors in dark. The petitioner, therefore, alleged that there is a deliberate and intentional breach of trust by the respondent No.1 and others who have by their aforesaid act, defrauded the shareholders of the Bank.

5. This application was considered by the Divisional Joint Registrar, who by his order dated 15.02.2003 granted sanction to prosecute the persons named in the order wherein the respondent No.1 is one of the persons mentioned. The learned Divisional Joint Registrar has in his order, on the basis of a statutory auditor's report, observed that there is a prima facie case made out for granting sanction. In particular, the Divisional Joint Registrar has observed that the statutory auditor's report of the year 1998-99 shows that the managing committee is responsible for the financial irregularities. The Divisional Joint Registrar observed that replies have been filed by the said Shri Tukaram Ramchandra Naik, a former Chairman, Shri Haribhau Kamba Mhatre, a former Dy. Chairman and Shri Anant Shankar Patil, a former Director. He has further referred to the statement of Tukaram Ramchandra Naik, who has stated that the respondent No.1 brought pressure and got the loan sanctioned in contravention of the bye-laws of the Bank. The Divisional Joint Registrar has referred to similar statements made by Haribhau K. Mhatre and Anant Shankar Patil in relation to the role allegedly played by the respondent No.1.

6. The Divisional Joint Registrar upon a perusal of the evidence observed that the Respondent Directors and Officers of the Bank while working as such, sanctioned loans illegally without the necessary documentation and without obtaining sufficient security for the loans. He also observed that as a result, the Bank's licence has been withdrawn by the Reserve Bank of India and a liquidator has been appointed. The Divisional Joint Registrar, therefore, granted permission to prosecute the Directors and Officers of the Bank namely, the Kalwa Belapur Sahakari Bank Ltd., under section 146 (o) and (q) of the Maharashtra Co-operative Societies Act, 1960, which reads as follows.

> "146. Offences.-- It shall be an offence under this Act, if-
>
> "(o) any officer of a society wilfully recommends or sanctions for his own personal use or benefit or for the use or benefit of a person in whom he is interested, a loan in the name of any other person; or
>
> "(q) any officer or member of a society or any

person does any act declared by the rules to be an offence.

Explanation. --For the purpose of this section, an officer or a member referred to in the section shall include past officer and past member, as the case may be.

7. It appears that the respondent No.1 alone preferred a revision to the Respondent State, which was decided by the State Minister (Co-operation), who has by his order dated 5.11.2003 set aside the sanction granted by the Divisional Joint Registrar.

8. Mr. Joshi, the learned counsel for the petitioner submitted that the order of the Revisional Authority suffers from an error of law apparent from its face in as much as the sanction granted by the Divisional Joint Registrar is set aside on the ground that the respondent No.1 was denied an adequate opportunity to defend his case properly, as observed by the Revisional Authority. He submitted that these observations were made on the basis that the respondent No.1 had asked for copies of the documents which were not legible to him and therefore, he sought for production of the original documents.

9. Mr. Joshi, the learned counsel for the petitioner therefore, submitted that the revisional authority has set aside the order granting sanction on the ground that notice of hearing was not issued even though an order passed for issuance of notice. As a result, the respondent No.1 could not remain present. Therefore, the Government has in revision held that the order is vitiated on account of the fact that it was behind the back of the respondent No.1. The learned counsel for the petitioner assailed the finding of the revisional authority who concluded as follows :-

> "The consequences of impugned order are very severe and therefore before passing impugned order, the Respondent No.1 ought to have given proper and fair opportunity of hearing to the Applicant. In the instant case, as observed in aforesaid paragraphs, the Respondent No.1 passed impugned order hurriedly and without giving fair opportunity to the Applicant. So also the Respondent No.1 has not conducted the hearing in accordance with the rules, principles of natural justice and established judicial conventions."

10. In short it appears from the impugned order that the revisional authority has interfered with the order granting sanction of prosecution on the ground that the sanction was granted without effectively hearing the respondent No.1.

11. A plain reading of the order does show that the order granting sanction to prosecute the respondent No. 1 has been set aside by the revisional authority, mainly, on the ground that he was not given an adequate opportunity to defend himself.

12. The only question is, therefore, whether the order granting sanction for prosecution has been validly set aside on the ground that persons against whom the allegations are made is liable to be heard. Indeed, if a person is not entitled to be heard, the question of adequacy of hearing would not arise.

13. In support of the contention, the learned counsel for the petitioner has relied on the decisions of the Supreme Court in the case of Superintendent of Police (C.B.I.) vs. Deepak Chowdhary & Ors., reported in 1995 Supreme Court Cases (Cri) 1095 and State of

M.P. vs. Dr. Krishna Chandra Saksena reported in (1996) 11 Supreme Court Cases 439. In the first case, the High Court had questioned the sanction on the ground that the respondent was not given any opportunity of hearing before granting sanction. The Hon'ble Supreme Court rejected that argument in the following terms vide paragraph 5 of the judgment, as follows :-

> "We find force in the contention. The grant of sanction is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a court of law. What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction. The grant of sanction, therefore, being administrative act the need to provide an opportunity of hearing

> to the accused before according sanction does not arise. The High Court, therefore, was clearly in error in holding that the order of sanction is vitiated by violation of the principles of natural justice".

14. In the second case cited supra, relied upon by the learned counsel for the petitioner, the Supreme Court has observed in paragraph 8 as follows :-

> "We must further hasten to add that if ultimately at the stage of trial it is found that the sanction was liable to fail on any relevant ground well made out by the defence then the respondent may be entitled to acquittal. But at the stage of quashing of criminal proceedings where even challan had not been filed the aforesaid order of sanction could not have been treated by the High Court as ex facie illegal or invalid. The reasons given by the learned Single Judge of the High Court in treating the sanction invalid were twofold. Firstly the sanction, according to the learned Judge was bad on the ground that

the accused was not heard. This ground is rightly not pressed by the learned Senior Counsel for the respondent as it is now well settled that at the stage of granting of sanction the accused need not be heard (State of Maharashtra Vs. Iswar Piraji Kalpatri and Supdt. of Police (C.B.I.) vs. Deepak Chowdhary).

15. Their Lordships of the Honourable Supreme Court thus reiterated their earlier view that it is not necessary to hear the accused before granting sanction for prosecution.

16. The impugned order which sets aside the sanction on the ground that the respondent No.1 was not given an adequate opportunity of being heard before granting sanction is thus unsustainable. This ground is not valid as held by the Supreme Court in the decisions cited supra. In this view of the matter, the impugned order is set aside.

17. Dr. Chowdhari, the learned counsel for the respondent No.1 submitted that the setting aside of

the order might prejudice the respondent No.1 in his defence that may be available to him. There is no reason for this apprehension since the grant of sanction to prosecute does not dislodge the presumption of innocence. All contentions and remedies which the respondent No.1 is entitled to avail in law are kept open.

DT.20.09.05 (S.A.BOBDE,J)

.....